

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
IN AND FOR THE
NINTH CIRCUIT

PEOPLE OF THE STATE OF CALI-
FORNIA, on the relation of Charles J.
McColgan, as State Franchise Tax Com-
missioner,

Appellant,

vs.

JOHN HOWARD BRUCE,

Appellee.

REPLY BRIEF FOR APPELLANT

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No. 9885

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FOREWORD

Appellee has not said much that requires answer. Comment is hereinafter made, regarding that portion of Appellee's argument which is not fully answered by the Appellant's opening brief.

ARGUMENT

A. Either the United States Supreme Court or the Federal district courts must exercise jurisdiction in actions of this nature and the United States Supreme Court has held that the Federal district courts have such jurisdiction

Clause 1 of section 2 of Article III of the United States Constitution provides that the jurisdiction

of the Federal courts extends to actions brought by a State against a citizen of another State. As the State of California is the real party in interest in this action, this action is between a State and a citizen of another State within the meaning of this constitutional provision, and within clause 2 of section 2 of Article III which confers original jurisdiction in this class of cases on the United States Supreme Court.

Oklahoma v. Cook, 304 U. S. 387.

Thus the United States Supreme Court was granted original jurisdiction of this class of suits by the Constitution.

The Federal courts were given jurisdiction of actions by a State against citizens of other States "to enable such controversies to be determined by a national tribunal, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens" (*Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289.) It would be manifestly improper for the Federal courts, whose judges are sworn to uphold the Constitution, to refuse to exercise the jurisdiction which the Constitution bestows on them. Thus to protect the plaintiff State and to abide by the Constitution, some Federal court must exercise jurisdiction over this action. If the Federal district courts do not have such jurisdic-

tion the United States Supreme Court, which does have it, must exercise it.

Under these circumstances, the decision in *Massachusetts v. Missouri*, 308 U. S. 1, that the United States Supreme Court need not exercise such jurisdiction because the Federal district courts are competent to entertain actions like this one, acquires added significance.

We believe that the foregoing is a complete answer to all that Appellee has said regarding jurisdiction of the Federal courts, except that which is said in connection with *U. S. v. Hill*, 123 U. S. 681, on pages 26 and 27 of Appellee's brief. *U. S. v. Hill* did not interpret section 41 of Title 28. It involved a statute which provided that appeal lay to the Supreme Court "in any action brought by the United States for the enforcement of any revenue law thereof." The court held that an action on the bond of a clerk of a Federal court was not an action for the enforcement of a revenue law. Thus the case has no bearing on the problem presented by this case.

B. As income may be "realized" and taxable even though it is not received by the taxpayer, the fact that the winnings were not received by appellee while he was a resident of California is not an obstacle to Appellee's being taxable on the winnings

Appellee has asserted that he could not be taxed by California because he did not "realize" his income until he had become a resident of Nevada.

Appellee's argument is founded on the misconceived notion that income is not realized until it has been received. Many examples may be offered to show the error in this belief. For instance, income may be realized and taxable when it has accrued even though not all of it will ever be received. (*Spring City Foundry Co. v. Commissioner*, 292 U. S. 182.) Or income may be realized by a taxpayer at the time that it is received by his donee. (*Helvering v. Horst*, 311 U. S. 112.)

In the case at bar, Appellee received the right to the winnings in 1936 while he was a resident of California. Thus the winnings accrued as income at that time. Section 16 of the California Personal Income Tax Act is identical to sections 41, 42 and 43 of the Federal Internal Revenue Code, and recognizes the accrual basis of reporting income. Under subsections (a) and (b) [sections 41 and 42(a)] the Commissioner could have compelled Appellee to report this income and pay a tax on it in 1936. His lenience in postponing the assessment until Appellee had received the income with which to pay the tax does not lessen the jurisdiction of California to exact the tax.

Appellee has otherwise ignored the arguments in Appellant's opening brief. The possible exception is the assertion that section 18 of the Personal Income Tax Act, authorizing jeopardy assessments, does not apply to nonresidents. The provisions of that section are the most eloquent answer to that

assertion, so we respectfully refer the Court to them. They are set forth in the Appendix hereto.

CONCLUSION

The judgment should be reversed and remanded to the district court with instructions to enter judgment for plaintiff as prayed.

Dated: November 7, 1941.

Respectfully submitted.

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APPENDIX

CALIFORNIA PERSONAL INCOME TAX ACT

Sec. 18.

(a) If the commissioner finds that a taxpayer designs quickly to depart from this State or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the commissioner shall declare the taxable period for such taxpayer immediately terminated and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and unpaid, whether or not the time otherwise allowed by law for filing the return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section the finding of the commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design.

(b) If the commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by

this act) and the amount so assessed shall be due and payable upon notice and demand from the commissioner.

(c) If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade tax, for any taxable year, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

Sec. 2.

(b) The word “taxpayer” includes any individual, fiduciary, estate, or trust subject to the tax imposed by this act.